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In the

Supreme Court of the United States

OCT Term, 1959

No. 639

EMMETT GRAHAM HAGY,
Petitioner and Defendant in Error Below

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
Respondent and Plaintiff in Error Below.

Petition for Writ of Certiorari to the Supreme Court of Appeals of Virginia and Brief in Support Thereof

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Respondent and Plaintiff in Error Below.

Petition for Writ of Certiorari to the Supreme Court of Appeals of Virginia and Brief in Support Thereof

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

SUMMARY STATEMENT OF MATTER INVOLVED

Plaintiff below, petitioner here, instituted action for personal injuries against the respondent, Norfolk & Western

Railway Company, in the Circuit Court of the City of Roanoke. Trial by jury was had, commencing June 16, 1958, and ending June 23, 1958, with a verdict for petitioner for $70,000.00.

Respondent moved to set aside the verdict and to grant a new trial. The motion was overruled.

Respondent sought and obtained writ of error to the Supreme Court of Appeals of Virginia.

The case was argued and decision handed down on September 3, 1959.

Petitioner filed Petition for Rehearing. Order was entered October 12, 1959, denying prayer of the petition.

II.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. Petitioner's $70,000.00 judgment was a property right of which he could not be deprived other than by due process of law. He has been deprived of his property in that judgment without due process of law, and has been denied the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of Appeals of Virginia, without right granted by law, treated the proceeding by writ of error as an appeal, retried the case, discarded the jury verdict approved by the trial court, and set aside petitioner's judgment.

3. When the violation of petitioner's constitutional rights was called to the attention of the Supreme Court of Appeals of Virginia by Petition for Rehearing, that court considered

but denied the petition. (Petition for Rehearing, P. 3, pp. 34-36; filed as Appendix hereto.)

4. The review of the proceedings in the Circuit Court of the City of Roanoke was had by permissive proceeding by writ of error, granted the defendant railroad company. Objections to evidence and procedure for purposes of review in Virginia are preserved by objection and exception. The common law of England, where not repugnant to the principles of the Bill of Rights and the Constitution of Virginia is the law of Virginia and the rule of decision except in those respects wherein it is altered by the General Assembly. (§1-10, Code of Virginia 1950).[1] Distinction between appeal and writ of error is preserved as at common law. (§8-462, Code of Virginia 1950). Only errors of law duly objected and excepted to will be noticed on appeal; and then only if the ground of objection is stated with reasonable certainty. (Rule 1:8, Rules of Court). The Supreme Court of Appeals of Virginia had jurisdiction only to review the errors of law presented in proceeding by writ of error in conformity with the Virginia Constitution, statutes and rules of court. Review in any other manner was illegal and a nullity. The dissolution of petitioner's judgment by unauthorized means deprived petitioner, an inhabitant of the United States, and a citizen thereof, of his property rights without due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

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[1] "§1-10. The Common Law.—The Common Law of England, in so far as it is not repugnant to the principles of the Bill of Rights and Constitution of this State, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly. (Code 1919 §2)"

III.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A.

Information Required by Rule 23

1. The opinion in the Supreme Court of Appeals of Virginia is reported in 201 Va. 183, 110 SE 2d 177, is made part hereof. (Appendix, Pp. 2-13.)

2. The date of the decision to be reviewed is September 3, 1959. Petition for Rehearing was denied by order entered November 12, 1959.

3. The statutory provision which is believed to sustain the jurisdiction of this Court is 28 U.S.C. §1257 (3):

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

B.

Statement of the Case

(Petition for Rehearing is filed and prayed to be read as a part hereof.) The pertinent facts are there analyzed. Petitioner, Emmett Graham Hagy, a florist's assistant, was plaintiff below. He was the operator of a one-half ton panel body truck which was struck by a backing railroad engine, with tender. His passenger, an eleven-year old neice, was

killed, being cut into three parts, and petitioner was permanently injured, suffering brain injuries.

The accident took place in the Town of Richlands, Virginia. The 1400-ft. area of track to the east of the crossing was customarily used by the respondent railroad for switching purposes. It brought loaded coal cars from points west of Richlands and stored them on storage tracks commencing about 1200 feet east of the crossing. Petitioner's evidence was so conclusive that it was admitted on appeal that the railroad was guilty of negligence.

Petitioner and most others living in the area knew the general custom and use of the track area, only about three through trains using the crossing each way daily. *The switching went on day and night.* It was conceded, on appeal, that it was the custom of the railroad *to blow* for the crossing commencing at a whistle post 1244 feet east of the crossing *when it was intended to run the train across the grade crossing, and not to blow* the whistle *when using the area for switching purposes.*

Petitioner was seen by the engineer approaching the crossing from the south, the evidence being at 5 or 6 miles an hour because of the very rough nature of the crossing, at a spur track 70 feet south of the main singletrack crossing. The engineer testified he was exceeding the railroad's speed limit of 30 miles per hour at that point, coasting backwards downgrade at between 30 and 35 miles an hour. He gave no signal and made no attempt to avoid a collision until within 15 feet of the crossing, a fact admitted by the railroad's fireman. Computation indicates the engineer first observed petitioner when the engine was 427½ to 546.25 feet from the crossing. (Petition for Rehearing, p. 36).

Petitioner saw the back of the engine when he approached within 12 or 15 feet of the crossing. His speed was such

that he could have stopped within a foot or two at any time had he been given a signal. He thought the engine was standing still. He could not see up the track to his right sooner because the road from which he had come curved in an arc from the east toward the north. The panel body truck had windows only in the doors, so he was able to gain a view up the track only gradually, as he approached the crossing. When he saw the engine it was approximately 264 feet from the crossing.

Just north of the crossing, 50 to 75 feet, is busy U. S. Route 360. Petitioner testified that on approaching the crossing it was necessary to watch for truck traffic approaching in an arc from his left converging on the track from an Esso bulk station a few yards away, Route 360 traffic coming into the little narrow road both from east and west, and railroad traffic from east and west. The engine struck the last six inches of the truck, turning it over and doing its destruction. Petitioner testified that had he been given a signal of any kind, he could have stopped immediately, or speeded up. Any change in pace, by warning, would have avoided the tragedy. The engineer admitted his failure to warn.

The jury found for petitioner and fixed his damages at $70,000.00. The trial judge overruled motion to set aside the verdict and entered final judgment. Respondent sought and obtained writ of error. The Supreme Court of Appeals of Virginia reversed and entered final judgment for defendant railroad. Petition for rehearing was denied. Among the grounds for rehearing was:

> "5. The decision in its present form, deprives the petitioner of the equal protection of the laws and without due process of law as guaranteed by the Constitution of Virginia and by the Constitution of the United

States, disregarding established law in favor of a special class of defendants."

As will be seen by reference to the Petition for Rehearing, the Supreme Court of Appeals of Virginia treated the proceeding as an appeal instead of writ of error, disregarded the jury verdict in favor of petitioner, found no fault with the finding instructions, which are thereby the law of the case, and proceeded to adopt facts to support the decision of reversal.

C.
Argument

1. Petitioner's judgment was a property right. *Hamilton v. City of New York*, 73 Atl. 1, 2, 82 Conn. 208; 7 Words and Phrases (Perm. Ed.) 174. A judgment for personal injuries is a "chose in action" within statute defining chose in action. *Carver v. Ferguson*, 254 P.2d 44, 45 (Cal. App.):

> "The assignment of a judgment necessarily carries with it the cause of action on which it is based, together with all the beneficial interest of the assignor in the judgment and all its incidents." 15 RCL. 777.

A person may be deprived of his property only by due process of law. Upon obtaining a final judgment, the judgment creditor becomes vested with the rights declared by the judgment. Among the means of avoiding a final judgment is appeal or proceeding by writ of error.

There is a definite distinction between an appeal and a proceeding by review and error. As stated in *Wingfield v. Neal*, 60 W. Va. 114, 54 SE 45, 49, 10 LRA (NS) 443, 116 Am. St. Rep. 882, 9 Ann. Cas. 982:

"An appeal is a process of civil law origin, and removes a cause entirely; subjecting the facts, as well as the law, to a review and retrial; but a writ of error is a suit of common law origin and it removes nothing for retrial but the law." (Citing:) *Wiscart* v. *Dauchy*, 3 Dall. (U. S.) 331, 1 L. Ed. 619; *Dower* v. *Richards*, 151 U. S. 658, 14 Sup. Ct. 452, 38 L. Ed. 305; *Elliott* v. *Toeppner*, 187 U. S. 327, 23 S. Ct. 133, 47 L. Ed. 200; *Lyles* v. *Barnes*, 40 Miss. 608; *Ketchum* v. *Thatcher*, 12 Mo. App. 185; *State* v. *Doane*, 35 Neb. 707, 53 N. W. 611; *U. S.* v. *Goodwin*, 7 Cranch. (U. S.) 108, 3 L. Ed. 284; 4 Minor 1059; 2 Cye. 515; 3 Bl. Com. 453.

* * *

"In fact, the writ of error, and appeal, under our statute, which are used to remove or bring causes to this court, are only distinguishable in this—appeal lies to equity proceedings, and writ of error to law cases. Therefore our statutory appeal cannot be considered a continuation of the same suit, because the decree of the lower court, when not suspended, becomes final and operative upon the adjournment of the term, unlike at the civil law, for there, when an appeal was taken, it was done at the same term, and when done, the decree never became final.

"It is a well-established principle of appellate procedure that writ of error is an independent action with the nature and with the general characteristics of a new and original suit." 7 Encyc. Pl. & Pr. §823.

In *Wiscart* v. *Dauchy* (1796) 3 Dall. (U. S.) 331, 1 L. Ed. 619, 626, Ellsworth, Chief Justice, said:

"The constitution, distributing the judicial power of the United States, vests in the Supreme Court, an original as well as an appellate jurisdiction. . . . In all other cases, only an appellate jurisdiction is given to the court, and even the appellate jurisdiction is, likewise, qualified;

inasmuch as it is given 'with such exceptions, and under such regulations, as the Congress shall make. . . .

"It is to be considered then, that the judicial statute of the United States speaks of an appeal and of a writ of error, but it does not confound the terms or use them promiscuously. . . . An appeal is a process of civil law origin, and removes a cause entirely, subjecting the fact as well as the law, to a review and retrial; but a writ of error is a process of common law origin, and it removes nothing for reexamination but the law."

In *Elliott* v. *Toeppner* (1902) 187 U. S. 327, 23 S. Ct. 133, 47 L. Ed. 200, 201, Chief Justice Fuller said:

"The question is whether the judgment could be otherwise revised than on writ of error, for if a writ of error should have been brought, then the circuit court of appeals had no authority to re-examine the proceedings on the jury trial, on appeal, or to remand for a new trial because of error in instructions given or refused, or in the admission or rejection of evidence, exceptions not having been preserved by a bill of exceptions."

Just as in *Wingfield* v. *Neal*, *supra*, the Virginia statute is similar, the West Virginia statute having been adopted from the Virginia statute, §8-462:

"(1) Any person who thinks himself aggrieved:

* * *

"May present a petition, if the case be in chancery, for an appeal from the decree or order, and if not in chancery, for a writ of error or supersedeas to the judgment or order. . . ."

Section 8-493, Code 1950, codifies rule of decision by Supreme Court of Appeals (App. 44).

The Virginia court was therefore without power to interfere with the rights of petitioner to the judgment obtained except by its appellate jurisdiction as at common law on proceeding by writ of error to review errors of law (App. 14).

No errors of law were sought to be corrected by the opinion of the court. It merely disagreed with the jury verdict. The facts urged by the plaintiff in error below, the defendant, were adopted as against the jury verdict. Although the decisions of the Virginia court are replete with statements that a litigant armed with a jury verdict occupies "*a position which is the strongest known to the law in a contest of this nature*", the court did not so much as give lip service to the rule. (See Petition for Review herein, pp. 3-6.)

In thus overlooking the limited power of its appellate jurisdiction by writ of error, the court acted without jurisdiction. This was pointed out as a violation of constitutional rights by the Petition for Review. In refusing to rehear, the court being apprised of its erroneous method of review, apparently took the position that its decisions established the law in Virginia. Were there no Fourteenth Amendment that would be true. Having failed to follow the pathway of due process, it would appear that the decision is void.

Had the court attacked the finding instruction submitted to the jury on the questions of contributory negligence and last clear chance, there might have been a legal basis for the decision. By ignoring the facts established by the favorable jury decision, and by adopting the railroad's discarded factual position, the court stated *that on the facts it chose to believe* the plaintiff was guilty of contributory negligence and the last clear chance doctrine did not apply.

It is respectfully submitted that it was not within the province of the Virginia Supreme Court of Appeals to retry

the facts of the case under Virginia law. In *Tabb* v. *Willis*, 155 Va. 836, 858, 156 S. E. 556, the court said:

> "When the verdict has been approved it is our duty to uphold it, save in exceptional cases and when it appears plainly necessary to prevent injustice. We cannot undertake to interfere merely because, in our judgment, the jury ought to have reached a different conclusion".

Had there been no controverted facts, then, as a matter of law, the court could have decided there was no evidence to go to the jury, or that the instructions were without evidence to support them. But, as here, where the facts determined by the jury's verdict required a plaintiff's verdict under the decisional law on the point, (Pet. for Rehearing, pp. 11-12), the court was without legal power to adopt jury-rejected facts because the appellate court preferred the railroad defendant's facts. Its only legal power was to hold the plaintiff's evidence inherently incredible, which it did not, and could not under the circumstances, or that the instructions were wrong. Under the line of Virginia cases cited, the instructions were correct. The dilemma could not be solved by reference to prior decisions. The problem was solved, just as it was by Alexander the Great, by use of physical power, by cutting the Gordian Knot, with his sword when he could not untie it.

It was to prevent solutions in that manner that written constitutional guaranties were set up.

In order to avoid repetition of facts or law, the Court is respectfully referred to the attached Petition for Rehearing, which, it is believed, graphically illustrates the method used in the opinion to avoid conflict with established law on the questions involved.

The first problem properly before the Virginia court was whether the instructions granted petitioner properly stated Virginia law. The opinion does not criticize the instructions, so it must be assumed the court had no desire to depart from established principles. Authority for the contributory negligence instruction is the line of cases listed on page 12 of the Petition for Rehearing. The instructions expressed the law of Virginia on contributory negligence. The jury found the plaintiff free of contributory negligence pursuant to the law of Virginia. The verdict was approved by the trial judge and final judgment entered for petitioner.

The next problem for the Virginia court if it desired to reverse, was to determine whether there was any proper evidence upon which the instructions could have been given. It resolved that problem by disregarding its own rule stated in hundreds of opinions over the years, as previously stated, that:

> "The verdict of the jury is conclusive in favor of the plaintiff's theory of the case, and in the consideration of the case, the court must assume that the facts established by the plaintiff's evidence are true." *Washington & O. D. R. Co. v. Weakley*, 140 Va. 790, 800, 125 S. E. 672.

At page 673 of 125 S. E., the Virginia court continued, after stating the foregoing:

> "*Keeping in mind this well-established rule of law*, let us examine carefully the facts of the case from the standpoint of the plaintiff's evidence. . . ."

This the Virginia court did not do. It adopted the facts contended for by the defendant railroad company, even though counsel for the appealing railroad admitted at the

bar of the Virginia court of last resort that it was guilty of negligence.

Skirting this firmly established rule of appellate review, the opinion reviewed some of petitioner's testimony, adopted contested argument and evidence of the defense, disregarded all prior Virginia decisions on contributory negligence at railroad crossings cited, answered the problem by relying on *Norfolk & W. R. Co. v. Benton*, 160 Va. 633, 169 S. E. 500, in which it had also reversed and entered final judgment for the Norfolk & Western although the decedent had followed the specific instruction of the railroad's flagman to cross, while waving down a slowly approaching train at a crossing. It stated that the decedent had no right to rely "solely and exclusively" upon "the invitation of the flagman to cross the track without looking for the approaching train which was in plain view."

Viewed from the standpoint of the jury-accepted plaintiff's facts, as required by the firmly established law of Virginia as well as in most if not all jurisdictions, the petitioner here did not blindly do anything. He looked and was deceived by the negligence of the defendant in silently coasting backwards toward the crossing without signal or warning contrary to firmly established custom. Petitioner had the right to believe that the engine was in the act of switching and could come all the way to the crossing but had no intention of crossing. Instruction No. 9 states the law of the case, not having been criticized by the appellate court:

> "The Court instructs the Jury that the operatives of railroad engines owe to travelers in vehicles on public ways or streets crossing the railroad tracks in reasonable proximity to such crossing the duty of keeping and maintaining a reasonable lookout to avoid injuring such persons. In the exercise of such duty the

operatives of the locomotive should give audible warning by whistle or bell or otherwise a reasonable distance from the crossing, to warn travelers of their intention to cross; and if you believe from a preponderance of the evidence in this case that it was the custom of the operatives of engines over the tracks in question to give signals of the intention to cross the grade crossing where the accident occurred, and that the operatives of the engine in question failed to keep and maintain a proper lookout for the plaintiff and give timely and suitable warnings of the approach of the engine and the intention to proceed West over the crossing, then the Court tells you, that if you do so believe, such failure on the part of the operatives of the engine in question was negligence, and if you believe that such negligence was a proximate cause of the accident in question, you should find your verdict for the Plaintiff, unless you further believe that the Plaintiff was also negligent in bringing about the accident in question and that his negligence contributed to the accident."

There is no contention that Instruction No. 13 does not correctly state the last clear chance rule of Virginia, as announced in *Grecar* v. *Noland Co.*, 197 Va. 233, 238, 239, 89 S. E. 2d 49, 53, and reiterated in this opinion (Record, P. 286).

If the case hinged on the last clear chance instruction, which was slightly defective technically, there should have been a reversal and a remand for a new trial. The court dismisses the last clear chance theory by saying, "There is no showing that the engineer had the last clear chance to avoid the collision *after he realized or ought to have realized, the peril of the plaintiff*." The evidence is overwhelmingly to the contrary, as explained in Petition for Rehearing, pp. 6-10. The appellate court merely chose to try the case as a civil law appeal rather than as a review on writ of error. It

was bound by the principles of writ of error. Any conclusion reached by unauthorized means is a nullity, unconstitutional, and void.

In conclusion, certain fundamental principles may here be pointed out.

In *Massa* v. *Nastri*, 125 Conn. 144, 3 A. 2d 839, 120 A. L. R. 939, it was held that a right of action, including one for personal injuries, is a vested property interest before as well as after judgment, at least where it comes into existence under common law principles and is not given by statute as a mere penalty or without equitable basis.

In the case of *West* v. *Jaloff*, 113 Ore. 184, 232 Pac. 642, 36 A. L. R. 1391, it was held that the common law remedy for negligence resulting in injuries cannot be taken away without providing some other efficient remedy. (See note 36 A. L. R. 1391 discussing constitutionality of statute or ordinance denying remedy for personal injury as a result of simple negligence.)

Accordingly, petitioner had a vested property right in his cause of action and a vested property right in his judgment. He could be deprived of such vested property right only by due process of law. It matters not whether the adverse result be by carelessness or design, the defective result is the same. *Townsend* v. *Burke*, Pa. 1948, 68 S. Ct. 1252, 334 U. S. 736, 92 L. Ed. 1690.

Furthermore, it appears that no court, legislature or executive has the right to release a tort feasor in a case such as this. Justice Brewer, in delivering the opinion of this Court in *Angle* v. *Chicago etc., R. Co.*, 151 U. S. 1, 14 Sup. Ct. 240 (1894), said:

> "A right of action to recover damages for an injury is property, and has a legislature the power to destroy such property? An executive may pardon and thus

relieve a wrongdoer from the punishment the public exacts from the wrong, but neither executive nor legislature can pardon a private wrong, or relieve the wrongdoer from civil liability to the individual he has wronged." (151 U. S. at page 19; 14 S. Ct. at page 247)

Also, we learn from American Jurisprudence that:

"A vested right of action is property in the same sense in which tangible things are property and is equally protected against arbitrary interference, and whether it springs from contracts or from the principles of the common law, the legislature may not take it away. To permit the legislature to destroy vested rights of action is in violation of the due process clause, and since the enactment of the 14th Amendment, such legislation is invalid thereunder, although prior to the passage of this amendment there was no Federal constitutional limitation on the state legislatures or Congress preventing the destruction of vested rights of action. Of course, as shown above, the appellant has no property in any particular remedy; all that he is guaranteed by the 14th Amendment is the preservation of his substantial right to redress by some effective procedure. * * * The same principle has been applied to a common-law remedy for negligence resulting in injuries, and such means of redress cannot be taken away without providing some other sufficient remedy." (11 Am. Jur., Constitutional Law, §377, page 1207)

And, in the recent case of *Terracciona* v. *Magee*, 53 N. J. Super. 557, 148 A. 2d 68 (1959), an infant while roller skating was injured in 1954 as a result of the alleged negligence of the Y.M.C.A. At the time the injuries were sustained and when suit was instituted in 1956, the infant had a valid vested right of action against the Y.M.C.A. free of

any defense of immunity from liability by reason of its status as a charitable institution. While the action was pending, the New Jersey legislature passed a statute which would, if applied retroactively, have granted immunity to the Y.M.C.A. as respects the infant's cause of action. The New Jersey Court held that it would be a denial of due process under the 14th Amendment of the United States Constitution to deprive the infant plaintiff of her vested right of action against the Y.M.C.A. In reaching its decision the Court said:

> "To interpret the statute in question as being retrospective in operation would destroy a vested right of property which inured to the infant plaintiff on the day she sustained her injuries. It is well settled that an action arising out of tortious conduct is a vested property right which is protected against impairment by the action of a state by virtue of the due process clause of the 14th Amendment of the United States Constitution." (148 A. 2d at page 75)

The ultimate and practical, as well as legal result here, subject to the action of this Honorable Court, is that the Virginia court has relieved the tortfeasor from all civil liability. It will have done that which could have been done by a State prior to the Fourteenth Amendment, but which that Amendment prohibits. No State court, legislature or executive may pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged. (151 U. S. at page 19, 14 S. Ct. at page 247).

D.

Prayer of Petition

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Su-

preme Court of Appeals of Virginia, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Supreme Court of Appeals of Virginia had in the case numbered and entitled on its docket, No. 4954, Norfolk and Western Railway Company, Plaintiff-in-Error v. Emmett Graham Hagy, Defendant-in-Error, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said Supreme Court of Appeals of Virginia be reversed by the court, and for such further relief as to this court may seem proper.

Dated January 7, 1960.

ISRAEL STEINGOLD
1032 Mutual Building
Richmond, Virginia
Attorney for Petitioner

APPENDIX.

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 12th day of October, 1959.

NORFOLK AND WESTERN RAILWAY COMPANY,
Plaintiff in error,

against

EMMETT GRAHAM HAGY,
Defendant in error.

Upon a Petition to Rehear

On mature consideration of the petition of Emmett Graham Hagy, defendant in error, to set aside the judgment rendered herein, on the 3rd day of September, 1959, and grant a rehearing thereof, the prayer of the said petition is denied.

A copy, Teste:
H. G. Turner
Clerk

Letter from Israel Steingold to Honorable H. G. Turner, Clerk, Supreme Court of Appeals of Virginia

October 15, 1959

Honorable H. G. Turner, Clerk
Supreme Court of Appeals of Virginia
Supreme Court of Appeals Building
Richmond, Virginia

Re: Norfolk and Western Railway Company
v. Emmett Graham Hagy

Dear Mr. Turner:

Defendant in error respectfully moves the Court to withhold mandate of review until he has had to opportunity to present petition for appeal or certiorari to the United States Supreme Court.

Yours very truly,

Israel Steingold

IS:mg

SUPREME COURT OF APPEALS OF VIRGINIA

Record No. 4954

NORFOLK AND WESTERN RAILWAY COMPANY,

v.

EMMETT GRAHAM HAGY

From the Circuit Court of the City of Roanoke
Frederick L. Hoback, Judge

Present: All the Justices

Opinion by Chief Justice John W. Eggleston

Staunton, Virginia, September 3, 1959

Emmett Graham Hagy, sometimes hereinafter referred to as the plaintiff, has recovered a verdict and judgment of $70,000 against the Norfolk and Western Railway Com-

pany for damages for personal injuries sustained when a truck which he was driving was struck by an engine and tender operated by the Railway Company at a crossing in the town of Richlands in Tazewell county. In its main assignments of error the Railway Company challenges the sufficiency of the evidence to sustain the verdict, claiming specifically that the plaintiff was guilty of contributory negligence which bars his recovery, and the ruling of the lower court in submitting to the jury whether the operator of the engine had the last clear chance to avoid the collision.

The accident occurred on Saturday, October 23, 1954, at approximately 12:30 p.m., on a clear, sunshiny day, when the plaintiff drove his truck northwardly onto the railroad crossing on the single-track main line of the Railway Company between Bluefield, West Virginia, and Norton, Virginia, and was struck by an engine and tender which were backing westwardly along the track. To the east of the crossing, the direction from which the engine and tender came, the track is straight for a distance of 3,000 feet. About 275 feet east of the crossing a spur track leads off from the southern side of the main line and runs southwesterly to an Esso Standard Oil storage plant. Approximately 900 feet east of the crossing two storage tracks, one on each side of the main line, lead eastwardly parallel to the main line. At the time of the collision there were no trains, cars, or engines on the spur or storage tracks.

An unpaved road, running east and west, lies south of and parallel to the main railroad track. It is used by travelers in going to and from the houses fronting on the southern side of the road to the crossing where the accident occurred. As this road goes westwardly toward the crossing it passes over the spur track and forks or divides. One fork, turning southwesterly to the left, leads to the Esso plant;

the other fork, turning northwesterly to the right, proceeds in a right-hand arc toward the crossing. From 15 to 25 feet south of the southern rail at the crossing the road straightens out, crosses the track at right angles, and leads to U. S. Highway No. 460. This highway runs parallel to the railroad and at the crossing its southern edge is 50 feet from the northern rail.

Hagy, the plaintiff, was twenty-seven years of age at the time of the accident and had lived at Richlands all of his life. He was in good health, an experienced driver, and employed as a deliveryman by a local florist. He testified that he was familiar with the crossing and for five years preceding the accident had driven over it "practically every day" in making deliveries for his employer and visiting his sister who lived on the road leading to the crossing. Indeed, he said, he had frequently driven over the crossing the identical truck which was involved in the collision. This was a panel truck with a closed body, a front window on each side of the driver's seat, and the usual front windshield.

On this occasion the plaintiff's eleven-year-old niece was seated on his right. They had just left the home of Hagy's sister on the south side of the road. Hagy testified that because the road was rough and unpaved he proceeded westwardly at from five to six miles per hour and crossed the spur track at about the same speed. As he crossed the spur track, he said, from his seat "it was hard to see up the track too far," so he asked his little companion whether she saw "anything." Her reply was, "No, it's one going up." Then, he said, "I proceeded on across" from the spur track toward the main line.

The undisputed evidence is that the distance between the northern rail of the spur track and the southern rail of the main line at the crossing is approximately 65 feet. The road

is rough and downgrade for a short distance from the spur track and then up a slight grade to the main track. Because of the rough condition of the road, Hagy said, he continued from the spur track toward the main crossing at about the same speed of five or six miles per hour; that when he was "closer to the main track" he "looked up there and saw the train, the back of it," and "thought" it was "standing still." He further said, "If it had give me a signal or anything like it always does, I'd have stopped" and "wouldn't have went across." But hearing no signal, he assumed that the way was clear, gave his attention to traffic on the main highway ahead, and proceeded onto the crossing where the collision occurred. According to his testimony he saw the engine and tender but the one time and had no "recollection of ever seeing" them moving.

It is undisputed that as Hagy approached the crossing the engine and tender were not standing, as he thought, and were not "going up," as the little girl had said, but were backing toward the crossing at a speed variously estimated from 25 to 35 miles per hour. The rear of the tender struck the right rear fender and bumper of the truck, throwing the vehicle to the north side of the track. The engine and tender came to a stop about 300 feet west of the crossing. The little girl was killed instantly and Hagy was seriously injured.

Hagy said that he was unable to estimate in feet how far the front of the truck was from the nearest rail at the crossing when he first saw the tender. He said at that time he was "coming up that rise toward the crossing." Now would he estimate in feet how far the tender was from the crossing when he first saw it. Later, during the trial, he returned to the stand and marked on a photograph the approximate position of the tender when he first saw it.

This was estimated at from 212 to 264 feet from the crossing.

Witnesses for the plaintiff testified that the crossing was much used and that trains passing over it customarily blew for it. However, they said, on this occasion no signal was given, and Richard H. O'Dell, the engineer, admitted this to be true.

O'Dell testified that he was seated on the right-hand side of the engine, that is, on the southern side, as it approached the crossing, on a slight downgrade at a speed of from 30 to 35 miles per hour. He first saw the plaintiff's truck as it came off the spur track which is about 65 feet from the crossing. The engine was then about 160 feet from the crossing. He did not blow the whistle, but since the engine and tender appeared to be in plain view of the driver of the truck, he (O'Dell) thought the driver would stop and not attempt to cross ahead of them. However, he said, when the truck was about halfway between the spur track and the crossing, the truck "speeded up" and he (O'Dell) realized that "he was not stopping" and applied the emergency brakes. But, as he further said, the engine was then only about 80 feet from the crossing and it was impossible with the emergency brakes to bring it to a stop before the collision. At the speed at which he was traveling O'Dell estimated that it would have required "several hundred feet" to have stopped the engine with the emergency brakes.

The undisputed evidence on behalf of the Railway Company is that the braking equipment on the engine was in good condition and that with emergency brakes, at a speed of 25 miles per hour it would have required about 400 feet, at a speed of 30 miles per hour it would have required about 500 feet, and at a speed of 35 miles per hour it would have required about 600 feet to have brought the engine to a stop.

Since the crossing is in an incorporated town and there is no evidence of an ordinance requiring the sounding of crossing signals, it is conceded that Code, § 56-414, as amended, imposing the duty of giving crossing signals, and the companion statute, Section 56-416, substituting the doctrine of comparative negligence for that of contributory negligence, are not applicable. Consequently, it must be determined by the application of common-law principles whether the engineer and fireman were negligent in not giving signals of the approaching engine and tender and whether the plaintiff was guilty of contributory negligence.

We hold, and the Railway Company concedes, that because of the nature of the crossing, its frequent use by the public with the knowledge of the Railway Company, and the custom of the operators of the trains to sound signals for the crossing, the jury were warranted in finding that the engineer and fireman were guilty of negligence in not giving adequate and timely warning of the approach of the engine to the crossing. *Norfolk & Western Ry. Co. v. Fletcher*, 198 Va. 397, 401, 94 S. E. 2d 251, 254, and cases there cited.

While some of the circumstances of the present case are unusual, the determination of whether the plaintiff was guilty of contributory negligence turns upon the application of simple and well-settled principles. It is elementary that a traveler on a highway before crossing a railroad track must exercise ordinary care and look effectively for approaching trains. While we have frequently said that whether a traveler has exercised ordinary care at a railroad crossing presents a question for the jury, we have many times held that under the particular circumstances of the case the traveler was guilty of contributory negligence as a matter of law. Such is the present case.

The principal and basic fact is that the plaintiff, an experienced driver, familiar with this crossing and familiar with the vehicle which he was then operating, drove slowly from a place of safety onto the crossing in front of the engine and tender which, if he ever saw, he did not look at with sufficient care to determine whether they were standing still, coming toward the crossing, or going in the opposite direction.

The evidence clearly shows that as the plaintiff approached the crossing he had ample opportunity to observe that the engine and tender were moving toward the crossing. From the time the plaintiff reached the spur track and began his turn toward the crossing his view of the main track was clear and unobstructed. There were no other cars or trains on the tracks and no other motor vehicles on the road leading to the crossing. Several witnesses for the plaintiff, as well as the engineer for the defendant Railway Company, testified that the engine and tender approached the crossing at from 25 to 35 miles per hour.

Silas L. Vance, a witness for the plaintiff, testified that he was standing on the porch of his residence on the south side of the road leading toward the crossing; that he saw both the engine and the truck approaching the crossing and saw that there "was going to be an accident," because as he said, "the engine was gaining so much on the truck and the truck didn't stop. I was looking to see him hit." And yet according to the testimony of the plaintiff he never saw the engine and tender until he was close to the crossing and even then did not observe that they were approaching.

If it be true, as the plaintiff says, that as he left the spur track and approached the main crossing it was difficult for him to see to the right, the direction from which the engine and tender came, through the right front window of the

truck, this was a condition which was well known to him since he had driven the same vehicle along the road and over this crossing many times. He was, then, required to use increased care commensurate with the conditions.

It is well settled that the fact that one is traveling in a covered or enclosed vehicle which interferes with his sight does not excuse him from looking or listening for approaching trains at a railroad crossing, but calls on him to use increased care commensurate with the situation. This is especially true where the traveler in such vehicle is familiar with the crossing. 75 C. J. S., Railroads, § 789, p. 59; 44 Am. Jur., Railroads, § 555, p. 808; *Nashville, Chattanooga & St. Louis Ry. Co.* v. *Stagner*, 305 Ky. 717, 205 S. W. 2d 493, 494.

In this connection it is significant to observe that in his original motion for judgment the plaintiff alleged "that he relied on his passenger in telling him that the track was clear." While in his amended motion he changed this allegation to read, that he "relied on his passenger to assist him in keeping a proper lookout for trains," it is apparent that his own testimony is in accord with his first allegation.

But this is not all. The plaintiff testified that as he neared the crossing he actually saw the engine and tender which he "thought" were standing still. According to his own testimony, the truck was in good condition and he was proceeding in second gear at from five to six miles per hour. It is a matter of common knowledge that at this speed the truck could have been stopped almost instantly. Indeed, the plaintiff testified that he "could almost stop immediately coming up the hill onto the track," and would have done so had he known that the engine and tender were approaching the crossing. To use his own words, "If it had give me a signal, I would have stopped." However, he did not stop or dimin-

ish his speed, but proceeded across the track without observing that the engine and tender were approaching.

The gist of the plaintiff's case is that the failure of the employees of the Railway Company to give the customary signal was an invitation for him to cross the track and the assurance that he could do so with safety. Assuming, but not deciding, that the failure to give the signal was an invitation to the plaintiff to cross the track, this did not relieve him of the duty of exercising ordinary care and looking effectively before going onto the track. Nor can the plaintiff relieve himself of this duty by saying, as he does in his brief, that his "failure to look effectively was brought on by the company's negligence." In effect, this is an invocation of the doctrine of comparative negligence which, as has been said, has no application here. The plaintiff here cannot excuse his contributory negligence by invoking and magnifying the negligence of the defendant Railway Company.

We have repeatedly held that the failure of a railway company to give the required signals does not relieve a traveler at a railroad crossing of all care. He must still exercise ordinary care to use his senses to observe whether a train is approaching. See *Southern Railway Co.* v. *Thompson*, 186 Va. 106, 41 S. E. 2d 456, and cases there collected. In that case the plaintiff drove onto a crossing in the city of Danville where his truck was struck by a slowly backing train. He assumed that because there was no flagman at the crossing, as required by a city ordinance, no train was approaching. Consequently, he never saw the train which struck his vehicle. In reversing a judgment for the plaintiff we held that he was guilty of contributory negligence as a matter of law in that he relied entirely upon the absence of the flagman as an invitation to cross the track and failed to see the oncoming train.

In *Norfolk & Western Ry. Co.* v. *Benton*, 160 Va. 633, 169 S. E. 560, a driver of an automobile was struck and killed at a crossing in the city of Hopewell. A flagman at the crossing signaled the train to stop and waved the driver of the automobile to cross. Relying upon this invitation, the decedent drove across the track without observing that the train had not stopped but was approaching. In reversing a judgment for the decedent's administratrix and entering final judgment for the defendant, we held that the decedent was guilty of contributory negligence as a matter of law in that he relied "solely and exclusively" upon the invitation of the flagman to cross the track without looking for the approaching train which was in plain view.

This is precisely what Hagy did. According to his own testimony, although he saw the engine and tender, he relied entirely upon the lack of a signal as an invitation to cross the track and drove onto the crossing without observing whether the near-by engine and tender were standing still, moving toward the crossing, or going in the opposite direction. Surely, such casual and perfunctory looking was not looking effectively or with reasonable care. It was tantamount to not looking at all and likely to produce the same result.

In his brief counsel for Hagy admits that the *Benton* case stands in his way and asserts that it is "contrary to the great weight of authority" and should be "disavowed" by us. We decline that invitation for the reason that that decision is based on sound reasoning and the application of elementary principles. It was expressly approved by us in *Southern Railway Co.* v. *Thompson*, *supra*, 186 Va., at page 114, 41 S. E. 2d, at page 460.

As the underlying principle was stated by Judge Dobie in *New York Central R. Co.* v. *Casto*, 4th Cir., 216 F. 2d 604,

606, the duty of a car operator approaching a railroad crossing "to look for approaching trains and to look effectively" "is not tempered by the failure of a railroad company to observe all safety requirements."

For these reasons we hold that the plaintiff was guilty of contributory negligence as a matter of law. Therefore, his case must fail unless it may be saved by the application of the doctrine of last clear chance.

In *Grecar* v. *Noland Company*, 197 Va. 233, 238, 239, 89 S. E. 2d 49, 53, we pointed out that the doctrine of last clear chance applies, "[1] Where the injured person has negligently placed himself in a situation of peril from which he is physically unable to remove himself, the defendant is liable if he saw, or should have seen, him in time to avert the accident by using reasonable care. [2] Where the plaintiff has negligently placed himself in a situation of peril from which he is physically able to remove himself, but is unconscious of his peril, the defendant is liable only if he saw the plaintiff and realized, or ought to have realized, his peril in time to avert the accident by using reasonable care."

Under these stated principles the doctrine of last clear chance is not applicable in the present case. If the facts and circumstances bring the plaintiff's case within the doctrine, it must be within the second class as defined in the *Grecar* case; that is, the plaintiff negligently placed himself in a situation of peril from which he was physically able to remove himself, but was unconscious of his peril, and the engineer saw the plaintiff and realized, or ought to have realized, his peril in time to avert the accident by using reasonable care.

But the facts and circumstances here do not place the plaintiff in that class. There is no showing that the engineer had the last clear chance to avoid the collision after he realized, or ought to have realized, the peril of the plaintiff. As

the engineer saw the plaintiff driving at a slow speed from the spur track toward the crossing, there was nothing to put him on notice that the plaintiff was unconscious of his peril until the plaintiff was within a few feet of the crossing. Then, as the engineer testified, the plaintiff speeded up his truck, which indicated that he intended to cross the track. Prior to that time, at the speed at which the plaintiff was proceeding, he could have stopped in ample time before reaching the track. Since the engine and tender were in plain view, the engineer had the right to assume that the plaintiff would stop. When the engineer first realized that the plaintiff would not stop, the tender was then only about 80 feet from the crossing. The undisputed evidence is that the engineer did not then have sufficient time and space to stop the engine before the collision. The last clear chance doctrine presupposes time for effective action and is not applicable when the time is too short for the defendant to avoid the accident by exercising reasonable care.

For these reasons the judgment is reversed, the verdict set aside, and a final judgment here entered for the defendant.

Reversed and final judgment.

§8-493 Code of Virginia 1950. — Decision of Supreme Court of Appeals. — "The Supreme Court of Appeals shall affirm the judgment, decree or order if there be no error therein, and reverse the same, in whole or in part, if erroneous, and enter such judgment, decree or order as to the court shall seem right and proper and shall render final judgment upon the merits whenever, in the opinion of the court, the facts before it are such as to enable the court to attain the ends of justice. A civil case shall not be remanded for a trial de novo except when the ends of justice require it, but the Supreme Court of Appeals shall, in the order remanding the case, if it be remanded, designate upon what questions or points a new trial is to be had. (Code 1919, §6365)"

Annotation to foregoing:

"How case to be stated. — Formerly a plaintiff in error stood in the Supreme Court of Appeals in the position of a demurrant to the evidence, but this has been changed. Now, under this section, in stating a case in that court which has been tried by a jury, it must be stated as the jury may have viewed it, remembering always that the jury are the sole judges of the weight to be given to the testimony of the witnesses, and also bearing in mind the weight attached to the verdict of a jury which has received the approval of the trial judge. *Quicer's Ins. Co.* v. *Perkinson*, 129 Va. 216, 105 S. E. 580; *Lorillard Co.* v. *Clay*, 127 Va. 734, 164 S. E. 384."